TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 142.

JOHN B. GLEASON, PETITIONER,

vs.

HARRY K. THAW.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI FILED APRIL 16, 1913.—CERTIORARI AND RETURN FILED SEPTEMBER 17, 1913.

(23,627)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 14, 1914.

a United States Circuit Court of Appeals for the Second Circuit.

JOHN B. GLEASON, Plaintiff in Error (Plaintiff Below),
v.
HARRY K. THAW, Defendant in Error (Defendant Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

1 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 8th day of December, in the year one thousand nine hundred and nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

JOHN B. GLEASON,
Plaintiff's Attorney.

Office and Post-office Address, No. 2 Rector Street, Borough of Manhattan, New York City.

2 *Complaint.*

United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

The plaintiff complains of the defendant and alleges:

I. The plaintiff is a citizen and a resident of the State of New York, and a resident of the Southern District of New York, and re-

sides at No. 210 Fifth avenue, in the City of New York, and is an attorney and counsellor at law of the State of New York, now and at all the times hereinafter mentioned, practicing his profession as such in the City of New York.

II. The defendant is a citizen and a resident of the State of Pennsylvania, and his domicile is in the City of Pittsburgh, in the State of Pennsylvania.

III. On June 28, 1906, the defendant was indicted at the City of New York for the crime of murder in the first degree, and pending the trial of the indictment was confined in the City Prison in the City of New York. The indictment was brought to trial upon the 23d day of January, 1907, and the trial continued until the 12th day of April, 1907, and resulted in a disagreement of the jury.

IV. On or about July 7, 1906, for the purpose of obtaining the services of the plaintiff until after the trial, without any pay-
3 ment or security given therefor, the defendant stated to the plaintiff that there had been a family settlement so that the defendant actually owned interests in his father's estate, or derived therefrom property interests more than enough to pay all the expenses of the trial, although these expense- should exceed $500,000 and that the actual value of the defendant's property interests that he could dispose of or mortgage was largely in excess of that sum.

V. Upon information and belief that in July, 1906, the defendant did not own property and property interests which he could sell or mortgage of the value of $500,000 and that the property and property interests which he could sell or mortgage were much less than $500,000, and these facts were at that time well known to the defendant.

VI. On or about July 7, 1906, the defendant, for the same purpose, stated to the plaintiff that the defendant was entitled in his own right to a clear annual income of over $30,000 as his own absolutely and without restriction.

VII. Upon information and belief that the defendant has never been entitled to a clear annual income of $30,000 or of $15,000 as his own absolutely and without restriction.

VIII. That the plaintiff believed and relied upon the aforesaid statements of the defendant and in this belief and reliance agreed with the defendant on or about July 7, 1906, to act as his counsel without any payment or security at the beginning of the services, and that in the event that Mary C. Thaw, the mother of the defendant, should agree with him to assume the payment of the bulk of the other expenses as advancements to him, payable only
4 from his share in her estate, and should provide for them as they occurred, that the plaintiff would continue to act as counsel and use all his time, so far as practicable, in the service of the defendant until after the trial without requiring any payment or security therefor.

That in August, 1906, defendant stated to the plaintiff that his mother had agreed with him to assume the payment of the bulk of the other expenses as advancements to him, payable only from his share in her estate. That thereupon the plaintiff agreed with

the defendant to act as counsel until after the trial without requiring any payment or security therefor, believing and relying upon the aforesaid statements.

IX. Upon information and belief, the mother of the defendant did not at any time agree with him to assume the payment of the bulk of the other expenses as advancements, payable only out of his share of the estate, but from time to time as payments were made by her, took the notes of the defendant therefor.

X. The defendant did not inform the plaintiff at any time of the giving of any note or notes by him to his mother, and the plaintiff was in ignorance of that fact until on or about the 7th day of August, 1908, when the defendant filed his petition in a voluntary bankruptcy in the District Court of the United States for the Western District of Pennsylvania, stating that his actual unsecured liabilities are $191,900 and that all but $400 is owing to his mother for money loaned from June, 1906, to 1907, and that she holds notes therefor.

XI. That between August 1, 1906, and the time of the trial the defendant from time to time pointed out and mentioned important items of expense as actually assumed or paid by his mother
5 as advancements to him and payable only from his share in her estate, of which the following are the particulars.

The bill of Dr. A. M. Hamilton for services in the summer of 1906 (assumed but amount disputed).

The moneys paid by her to Hartridge & Peabody.

The bill of Hartridge & Peabody.

Counsel fee of Mr. Delmas.

XII. In November and in December, 1906, the defendant stated to the plaintiff that all the sums paid or to be paid by his mother were chargeable only against his share in her estate.

XIII. About December 15, 1906, the defendant stated to the plaintiff that Mary C. Thaw had changed her will so as to charge all sums paid and to be paid by her in his defence or for him, against his share in her estate and that he did not have to pay them and that they were contributions to his defence.

XIV. Upon information and belief that each and every of the aforesaid statements of the defendant was false and untrue and each was known by the defendant to be false and untrue at the time of making thereof.

That the aforesaid representations of July, 1906, were made before any contract was entered into between the parties and for the sake of obtaining the right to command plaintiff's services until after the trial and of obtaining the services and disbursements of the plaintiff without any payment or security therefor and for the sake of procuring the plaintiff to enter into the said contract of July, 1906, and that the aforesaid subsequent statements of the defendant as to his mother were made for the purpose of keeping the said contract in force and of obtaining the
6 services of the plaintiff without payment or security and preventing the plaintiff from obtaining security from Mary C. Thaw so that the defendant might have the full and exclusive use of the plaintiff's services without any suspicion or fear on the part

of the defendant that the plaintiff was responsible to any one else as employer.

XV. That the plaintiff was the chief counsel of the defendant from July 14, 1906, until February 7, 1907, when without fault on the part of the plaintiff and in the performance of services of great value to the defendant, the plaintiff gave up his position as chief counsel and continued to act as counsel for the defendant until on or about June 1, 1907.

XVI. That the plaintiff was counsel for the defendant from, on or about June 7, 1906, to about June 1, 1907, and that as counsel for the defendant and at his special instance and request the plaintiff performed services for him between July 7, 1906, and June 1, 1907, in and about his indictment and the matters connected therewith, and the preparation for the trial and the trial thereof, and touching his sanity and matters affecting the defendant, which services were reasonably worth the sum of $80,000.

XVII. That the plaintiff received from the defendant $30,000. That *of* this sum $30,000 was paid to the plaintiff as chief counsel to be used in his discretion for the general purposes of the defense.

XVIII. That the plaintiff made certain disbursements for the defendant and at his request, amounting to the sum of $10,115.

That in March, 1907, the plaintiff rendered an account of disbursements to the defendant, showing an account of dis-
7 bursements of $10,115 and the account of disbursements was settled and stated between plaintiff and defendant as being $10,115.

XIX. That all the aforesaid services and all the aforesaid disbursements were made by the plaintiff in reliance upon the aforesaid false and fraudulent statements and representations of the defendant, made for the purpose of obtaining the same and without which the plaintiff would not have performed the said services nor made the said disbursements. That at the time of the payment of the said moneys to the plaintiff, the value of the plaintiff's services was greatly in excess of all sums paid and but for the aforesaid false representations, the plaintiff would not have made said disbursements.

XX. That in retaining the plaintiff the defendant stated that he desired that the plaintiff should be his own special counsel and responsible to him alone and that the plaintiff should not accept or require any payment or security or retainer from any of his family and the plaintiff consented thereto, in reliance upon said false representations. That Mary C. Thaw, the mother of the defendant is a woman of great wealth and was ready and anxious to assist in the defense to the extreme of her power and financial ability, and upon information and belief the plaintiff alleges that said Mary C. Thaw would have assumed the payment of the plaintiff's bill if required.

XXI. That in November, 1906, the plaintiff relying upon the said representations of the defendant agreed with the defendant that the defendant after the trial should pay the plaintiff as much as $50,000 for the plaintiff's services and that if the bill should be

more than $50,000 that the plaintiff would arbitrate the bill before any first class lawyer or first class business man, upon whom
8 the plaintiff and the defendant should agree, if the defendant should prefer to arbitrate the bill.

That after the trial the plaintiff made a statement to the defendant as to the value of the services and thereupon offered the defendant in writing to leave the amount of the bill to any first class lawyer or first class business man, upon whom the plaintiff and defendant should agree.

That the defendant neglected to make any adjustment of the bill and did not consent to arbitrate and that the plaintiff relying upon the aforesaid statement of the defendant as continuing representations as to the fact, continued the credit to the defendant until August 9, 1908.

XXII. That the defendant between July 7, 1906, and June 1, 1907, obtained the right to receive and did receive the services of the plaintiff of the value of $80,000 and procured the plaintiff to make the aforesaid disbursements of $10,115 by false pretenses and false representations and that after applying all sums received by the defendant from the plaintiff in reduction of the damages arising from the liability for obtaining the said services, the plaintiff has suffered damage from the fraud of the defendant in the sum of $60,000 and interest from June 1, 1908, and that this action is brought solely to recover for the liability of the defendant to the plaintiff under the said pretenses and false representations.

Wherefore, the plaintiff demands judgment against the defendant for the sum of sixty thousand dollars ($60,000) and interest thereon from June 1, 1907, together with costs.

JOHN B. GLEASON,
Plaintiff and Attorney in Person,
No. 2 Rector Street, New York City, N. Y.

9 SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, ss:

John B. Gleason, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN B. GLEASON.

Sworn to before me this 6th day of December, 1909.

[L. S.] CHAS. L. THATCHER,
Notary Public, New York County.

United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

The defendant for his amended answer to the complaint of the plaintiff shows and alleges:

First. That he specifically denies each and every allegation contained in paragraphs marked 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

10 Defendant further answering said complaint shows and alleges:

First. That heretofore this plaintiff was employed by this defendant to render certain services which were the services mentioned in the complaint herein with the express understanding and agreement that such services were to be paid for in the sum of Ten Thousand Dollars and no more and that the said plaintiff has been fully paid for such services.

Defendant further answering said complaint shows and alleges:

First. That the services so rendered by the plaintiff as alleged in the complaint herein were worth not to exceed the sum of Ten Thousand Dollars, and that said Ten Thousand Dollars was the amount specifically agreed upon for such services between this plaintiff and the defendant.

Defendant further answering said complaint and by way of defense and counter claim shows and alleges:

First. That heretofore this defendant employed the plaintiff to defend him *on* or about July, 1906, and that said plaintiff performed certain services *which* in the defense of an indictment against this defendant, which services were not worth to exceed the sum of Ten Thousand Dollars; that during the progress of the trial and in December, 1906, and in June, 1907, this defendant gave to said plaintiff herein the sum of Thirty Thousand Dollars, Ten Thousand Dollars in payment of services and Twenty Thousand One Hundred Dollars to use by the plaintiff herein for expenses and disbursements with the express understanding and stipulation between the plaintiff and defendant at said time that any amount not disbursed

11 or expended of said Twenty Thousand One Hundred Dollars thereof should be returned to this defendant, and that said plaintiff did in pursuance *to* such arrangement expend and disburse for this defendant the sum of Ten Thousand, One Hundred and Fifteen Dollars, and still has in his hands which he has not disbursed or expended the sum of Nine Thousand Nine Hundred Eighty-five Dollars which said plaintiff has never paid to this defendant, and which amount is still due and owing this defendant from said plaintiff.

For a further and separate defense, defendant alleges:

That no misrepresentation was made to the plaintiff by the defendant to obtain his services and the defendant has by a court of competent jurisdiction been adjudicated a bankrupt since the transaction referred to in the complaint, and the plaintiff has appeared and proved his alleged claim in such bankruptcy proceedings, and the plaintiff's claim has been disputed by the defendant in said

bankruptcy proceedings, and the contest between the plaintiff and defendant in those proceedings is now pending in the United States District Court at Pittsburgh, in the State of Pensylvania, which is the defendant's legal residence, and will be litigated in the distribution of the defendant's estate in bankruptcy. For a further and separate defense the defendant further alleges:

That on or about July 6, 1906, and before the time of the alleged representations set forth in the complaint upon which plaintiff alleges he was employed this defendant paid to the plaintiff the sum of One Hundred Dollars as a retainer, and that the contract of employment was made at that time and without any misrepresentations on the part of the defendant.

12 Wherefore, this defendant demands that the complaint of the plaintiff be dismissed, and that this defendant have judgment against the plaintiff for the sum of Nine Thousand Nine Hundred and Eighty-five Dollars with interest thereon from June, 1907, besides costs.

CHARLES MORSCHAUSER,
Attorney for the Defendant.

Office and Post-office Address, 234 Main street, Poughkeepsie, N. Y.

STATE OF NEW YORK,
County of Dutchess, ss:

Henry Kendall Thaw, being duly sworn, deposes and says that he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY KENDALL THAW.

Sworn to before me this 3d day of February, 1910.
W. E. HOYSRADT,
Notary Public.

13 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

The plaintiff denies each and every allegation of the counterclaim, except

1. The plaintiff admits that the defendant employed the plaintiff to defend him *on* or about July, 1906, and that the plaintiff performed certain services in the defense of an indictment against the defendant and that the defendant paid to the plaintiff thirty thousand one hundred dollars of which a portion was paid in December, 1906, and that the plaintiff did expend and disburse for the defendant the sum of ten thousand one hundred and fifteen dollars in cash.

2. The plaintiff further replying says that the sum of thirty thousand one hundred dollars received from the defendant was received under the circumstances set forth in the complaint and was applied by the plaintiff in reduction of the amount due him for services as in the complaint alleged leaving due and owing to the plaintiff the sum of sixty thousand dollars and interest from June 1, 1907.

3. Further answering the plaintiff alleges that on or about August 18, 1908, the defendant filed his petition in bankruptcy in the United States District Court for the Western District of Pennsylvania, and has been adjudicated a bankrupt and Roger
14 O'Mara, of Pittsburg, is the Trustee of his estate in bankruptcy.

Wherefore, the plaintiff demands judgment against the defendant as in the complaint is demanded.

JOHN B. GLEASON,
Plaintiff's Attorney,
No. 2 Rector Street, New York City, N. Y.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

John B. Gleason, being duly sworn, says, that he is the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

JOHN B. GLEASON.

Sworn to before me this 24th day of January, 1910.
[L. S.] CHAS. L. THATCHER,
Notary Public, N. Y. Co.

15 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

Stipulated that the amended answer, verified February 3, 1910, is accepted by the plaintiff as the original answer in the action, and that the reply of the plaintiff to the counterclaim heretofore served shall stand as the reply to the counterclaim contained in the amended answer, without further service, and that the notice of trial heretofore served by the plaintiff remain in full force, the same as if the amended answer had been served as the original answer.

Dated February 7, 1910.

JOHN B. GLEASON,
Plaintiff's Attorney.
C. MORSCHAUSER,
Defendant's Attorney.

16 United States Circuit Court for the Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

Now comes the defendant, Harry K. Thaw, and by leave of the Court first had and obtained, makes this his supplemental answer to the complaint of the plaintiff herein, and says and alleges:

For a First Supplemental Defense:

That heretofore and on or about the 7th day of August, 1908 (and before the commencement of this action) a petition was duly filed by this defendant as petitioner in the United States District Court for the Western District of Pennsylvania sitting in bankruptcy, alleging among other things that the petitioner, this defendant, was insolvent, and asking to be adjudicated a bankrupt and to be discharged from all his debts. Annexed to said petition were the schedules required by law, among them the schedule giving a list of the creditors of the petitioner and the amounts due or claimed. That in such list was the claim of the plaintiff for $80,000 for legal services and expenses and a statement that such claim was disputed, and defendant begs leave to refer to such petition on the trial for a more particular statement of the contents.

That said United States District Court for the Western District of Pennsylvania then and there had jurisdiction of the peti-
17 tioner, this defendant, and also of the subject matter of said petition and all said bankruptcy proceedings.

That thereafter such proceedings were duly had in said bankruptcy proceedings in said Court that the petitioner, this defendant, was duly adjudicated a bankrupt.

That thereafter and upon proceedings duly had in said bankruptcy proceedings, and on notice to the plaintiff, an order was duly made by the United States District Court for the Western District of Pennsylvania, staying the plaintiff from further prosecuting this action until the said Court had passed upon the question of the discharge from his debts of the said petitioner, this defendant. A copy of such order is hereto annexed marked "A."

That thereafter and on or about the 29th of December, 1910, upon proceedings duly had therein, and in accordance with all the requirements of law in that behalf, the said United States District Court for the Western District of Pennsylvania duly granted to the said petitioner, this defendant, a discharge from all debts and claims which were provable against said petitioner, this defendant, and which existed on the 7th day of August, 1908. A copy of such discharge being hereto annexed marked "B."

That the alleged claim of the plaintiff existed prior to the 7th of August, 1908, and is a claim, as appears from the complaint herein, that under the Acts of Congress relating to bankrupts, was made provable against the estate of the petitioner, this defendant.

That by virtue of said bankruptcy proceedings and said discharge as hereinbefore set out, the plaintiff is barred and prevented from further prosecuting this case, and this defendant has been
18 forever released and discharged from any alleged claim set forth in the complaint herein.

For a second supplemental defense this defendant says:

That heretofore and on or about the 7th day of August, 1908 (and before the commencement of this action), a petition was duly filed by this defendant as petitioner in the United States District Court for the Western District of Pennsylvania, sitting in bankruptcy, alleging among other things that the petitioner, this defendant, was insolvent, and asking to be adjudicated a bankrupt and to be discharged from all his debts. Such petition is the same as hereinbefore referred to.

That said United States Distrist Court for the Western District of Pennsylvania then and there had jurisdiction of the petitioner, this defendant, and also of the subject matter of said petition and all said bankruptcy proceedings.

That thereafter such proceedings were duly had in such bankruptcy proceedings in said Court that the petitioner, this defendant, was duly adjudicated a bankrupt.

That, as appears from said petition and schedules, among the claims against the petitioner, this defendant, was one of John B. Gleason for $80,000, which was disputed by the petitioner. That the John B. Gleason named in such schedule was this plaintiff, and the claim specified therein was for the same legal services and expenses as the claim made in the Complaint in this action.

That thereafter in said bankruptcy proceedings, the said John B. Gleason, this plaintiff, duly filed a claim against the peti-
19 tioner, this defendant, for $80,000. A copy of such claim is hereto annexed marked "C."

The exceptions and objection to such claim were duly made and filed, and thereafter testimony was taken on such claim and the objections before the Referee in Bankruptcy, and the questions as to such claim submitted to such Referee, who thereafter rendered a decision in favor of the claimant, the plaintiff herein, and against the bankrupt, this defendant, for the sum of $24,515, and thereafter such decision and finding was duly approved and confirmed by the Court, and no appeal or review thereof has been taken or had by either party, and the time to review such decision and judgment has long since expired.

That thereafter a dividend on the bankrupt's estate was duly declared, and the dividend on such judgment was made, which dividend was about the sum of $1,225.75, and this plaintiff, with notice of all the facts, received, accepted, and receipted for such dividend.

That there are assets of said estate not yet distributed, and there will be a further dividend on said claim of the plaintiff as proved and established as aforesaid.

That the legal services and expenses alleged to have been rendered by the plaintiff for the defendant by the complaint herein are the

legal services and expenses as alleged in said claim presented and adjudicated in the bankruptcy proceedings, as hereinbefore set forth.

That this defendant, while denying any false representations made by him to the plaintiff, as alleged in the Complaint, and also denying that any property was obtained from the plaintiff by the defendant by any false representations, alleges and avers that by the proving of the claim of the plaintiff in the bankruptcy proceedings, and the acceptance of a dividend on the claim as proved, this plaintiff has elected to waive any tort or wrong in connection with said claim, and that his action in proving the claim in the bankruptcy proceeding estops and bars him from further prosecution of this action.

Wherefore, the defendant demands judgment that the Complaint herein be dismissed, with costs.

MORSCHAUSER & HOYSRADT,
Attorneys for Defendant.

Office and Post-office Address, No. 234 Main Street, Poughkeepsie, New York.

"A."

Order of Court.

And now, to wit: This 15th day of March, 1910, the within petition being presented in open court, and after due consideration thereof, upon motion it is ordered and directed that an injunction issue as prayed for restraining the said John B. Gleason, his agent, servants, attorneys and counsellors, from taking any further steps or proceeding in said action, until the question of the discharge of the said Henry Kendall Thaw as a bankrupt is determined, or until our said District Court shall make further order in the premises.

Per CURIAM.

"B."

District Court of the United States, Western District of Pennsylvania.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Whereas, Henry Kendall Thaw, of Allegheny County, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this Court, that said Henry Kendall Thaw be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the seventh day of August, A. D., 1908, on which day the petition for adjudication was filed by him; except-

ing such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness, the Honorable, the Judges of the District Court of the United States, for the Western District of Pennsylvania, and the seal thereof, at the City of Pittsburgh, in said district, this 29th day of December, A. D., 1910.

[SEAL.] WM. F. LINDSAY, *Clerk.*

22 "C."

In the District Court of the United States for the Western District of Pennsylvania.

No. 4290. In Bankruptcy.

In the Matter of HENRY K. THAW, Bankrupt.

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

John B. Gleason, being duly sworn, says:

I. I reside at No. 350 West Seventy-first street, in the City of New York, and am a resident of the State of New York and am an attorney and counsellor at law of the State of New York, now and at all the times hereinafter mentioned practising my profession as such in the City of New York.

II. On June 28, 1906, Henry K. Thaw, the bankrupt, commonly known as Harry K. Thaw, was indicted in the City of New York for the crime of murder in the first degree and pending the trial of the indictment, was confined in the City Prison of the City of New York. The indictment was brought to trial on the 23d day of January, 1907, and the trial continued until the 12th day of April, 1907, and resulted in a disagreement of the jury.

III. Deponent was retained by said Thaw in July, 1906, as his counsel upon his indictment and the matters connected
23 therewith, and the trial and preparation therefor, and all matters touching said Thaw's sanity, and generally as counsel for the said Thaw upon matters concerning him.

Deponent was his chief counsel from July 14, 1906, to February 7, 1907, and thereafter continued to act as counsel for said Thaw until on or about June 1, 1907.

IV. As counsel for the said Thaw, and at his special instance and request, deponent performed services for him between July 7, 1906, and June 1, 1907, in and about his indictment and the matters connected therewith and the preparation for the trial and the trial thereof and touching his sanity and matters affecting the said Thaw, which services were reasonably worth the sum of eighty thousand dollars.

Deponent made certain disbursements for the said Thaw and at his request, amounting to the sum of ten thousand one hundred

and fifteen dollars ($10,115). In March, 1907, deponent rendered an account of disbursements amounting to ten thousand one hundred and fifteen dollars ($10,115) and the account of disbursements was settled and stated between said Thaw and deponent as being ten thousand one hundred and fifteen dollars ($10,115). Deponent received from the said Thaw thirty thousand one hundred dollars ($30,100) and no more.

V. On June 1, 1907, the sum of sixty thousand dollars remained due and owing deponent from the said Thaw and since June 1, 1907, the sum of sixty thousand dollars, with interest from June 1, 1907, has remained due and owing from said Thaw on account of deponent's services to him as counsel in the aforesaid matters and on account of the disbursements made by deponent amounting to the aforesaid sum, and said sum of sixty thousand dollars
24 is now due and owing to deponent from said bankrupt and from his estate.

There have been no payments made to me on account of this balance due deponent and there are no offsets or counterclaims thereto.

VI. That it was specifically agreed between the said Thaw and this deponent, that deponent should receive at least fifty thousand dollars for the aforesaid services, and should be entitled to charge at the rate charged by first-class lawyers in The City of New York, and it was further specified that if the amount of deponent's bill should be in excess of fifty thousand dollars, the said Thaw should have the option to arbitrate the bill before any first-class lawyer, or first-class business man upon whom said Thaw and deponent should agree. That subsequent to June 1, 1907, deponent offered in writing to arbitrate the entire amount of his bill before any first-class lawyer or first-class business man upon whom the parties should agree, but said Thaw did not consent thereto.

JOHN B. GLEASON.

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

John B. Gleason, being duly sworn, deposes and says, that Henry K. Thaw, the person by whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition and still is indebted to deponent in the sum of sixty thousand dollars, with interest from June 1, 1907, and that the consideration of said debt is a balance due and owing to deponent for professional services and disbursements as specified in the foregoing statement.

That no part of said debt has been paid and that there
25 are no offsets or counterclaims to the same, and that deponent has not, nor has any person by his order or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever; that the said debt is an unliquidated claim except that by agreement between said Thaw and deponent it was agreed that the bill should be at least fifty thousand dollars; that

no note has been received on account of said debt, nor has any judgment been rendered thereon.

JOHN B. GLEASON.

Subscribed and sworn to before me this 10th day of June, 1909.

CHARLES L. THATCHER,
[SEAL.] *Notary Public, N. Y. Co.*

United States Circuit Court for the Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

Demurrer to First Supplemental Defense.

The plaintiff demurs to the first supplemental defense of the defendant upon the ground that this defense is insufficient in law upon the face thereof and that the causes of action stated in the plaintiff's complaint are liabilities for obtaining property by false pretenses or false representations.

26 Wherefore, the plaintiff prays for judgment against the defendant as in the complaint is demanded.

JOHN B. GLEASON,
Plaintiff's Attorney.

No. 2 Rector Street, New York City.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, John B. Gleason, of No. 2 Rector street, New York City, do hereby certify that I am a counselor of this court and that in my opinion the foregoing demurrer is well founded; also that the same is not interposed for the purpose of delay.

JOHN B. GLEASON,
Plaintiff's Attorney.

No. 2 Rector Street, New York City.

27 At a Stated Term of the United States Circuit Court, Held in and for the Southern District of New York, on the 24th day of June, 1911.

Present: Hon. E. Henry Lacombe, Circuit Judge.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

The plaintiff coming into Court by demurrer and conceding that the defendant has obtained the discharge in bankruptcy set up in the first supplemental defense, and that the complaint should be dis-

missed if it does not allege any liability of the defendant for obtaining property by false pretenses or false representations which cannot under the bankruptcy law be discharged; and the demurrer of the plaintiff to the first supplemental defense having been argued by John B. Gleason in favor of the demurrer, and by Stewart J. Rose of counsel for the defendant, in opposition thereto.

Now, on motion of Morschauser & Hoysradt, attorneys for the defendant, it is

Ordered, That said demurrer is overruled and that the defendant have judgment herein dismissing the complaint with costs, but if the demurrer is finally held to be good and the judgment is reversed, a trial shall be held on the other issues.

E. H. LACOMBE,
U. S. Circuit Judge.

Filed June 24, 1911.

28 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON
against
HARRY K. THAW.

Postea.

This action having been brought to a hearing on a demurrer by the plaintiff to the first supplemental defense of the answer, and having been heard and an order having been duly entered overruling such demurrer and directing that defendant have judgment dismissing the complaint with costs, and the costs having been taxed at nineteen and 25/100 dollars.

Now, on motion of Morschauser & Hoysradt, attorneys for the defendant,

Ordered and adjudged that the defendant, Harry K. Thaw, have judgment dismissing the complaint herein, and that said defendant Harry K. Thaw have and recover judgment against John B. Gleason, the plaintiff, for the sum of nineteen and 25/100 dollars, and that he have execution therefor.

Judgment signed this 6th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

29 *Opinion.*

United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

LACOMBE, *C. J.:*

The complaint is brought to recover for legal services and disbursements which it is alleged were obtained from the plaintiff by false pretenses and false representations.

The answer, inter alia, set up as a supplemental defense that defendant was adjudicated a bankrupt, and that plaintiff's claim was enumerated in his schedules, that it is a claim provable against his estate and that in due course defendant was discharged by the Bankruptcy Court from all provable debts and claims.

Plaintiff has demurred to this defense. It is not necessary to discuss the question there raised since both sides agree that the same question was litigated between the same parties in Gleason vs. Thaw, 185 F. R., 345 (C. C. A. Third Circuit), as decided adversely to the plaintiff. This Court will follow the decision of the Court of Appeals.

Demurrer overruled.

Filed May 31, 1911.

JOHN A. SHIELDS,
Clerk U. S. Circuit Court, Southern District N. Y.

30 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

Assignment of Errors.

1. The Court erred in refusing to sustain the demurrer.
2. The Court erred in making the order of June 24, 1911, and in granting the judgment of July 6, 1911, for the dismissal of the complaint with costs.
3. The aforesaid errors were wholly in matter of law in that the suit brought by the plaintiff if upon a liability for obtaining property by false pretenses or false representations within the meaning of the Bankruptcy Act, section 17 (2), and the provable debt of the defendant to the plaintiff was not affected by the discharge in bankruptcy, and the Court erred in refusing so to hold and decide.

Petition for Writ of Error and Prayer for Reversal.

Upon the judgment roll herein filed July 6, 1911, and this assignment of error and a sufficient bond the plaintiff prays for a writ of error to review the said judgment and order and prays that the said judgment shall be reversed and the said order vacated
31 and judgment directed for the plaintiff upon the demurrer.

JOHN B. GLEASON,
Plaintiff's Attorney, No. 2 Rector Street, New York City.

Filed November 27, 1911.

United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

Know all Men by These Presents:

That the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and having an office and principal place of business for the State of New York at No. 2 Rector street, in the Borough of Manhattan, City of New York, is held and firmly bound unto Harry K. Thaw, in the sum of Two Hundred and Fifty Dollars ($250), to be paid to the said Harry K. Thaw, his executors, administrators or assigns; for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal, and dated this fifteenth day of November nineteen hundred and eleven.

32 Whereas, John B. Gleason has appealed to the Circuit Court of Appeals of the United States for the Second Judicial Circuit, from judgment dismissing complaint and for costs, filed in the office of the Clerk of the United States Circuit Court, Southern District of New York on the 6th day of July 1911, dismissing the complaint of John B. Gleason against Harry K. Thaw, and that said defendant Harry K. Thaw recover judgment against John B. Gleason, the plaintiff, for the sum of nineteen and 25/100 Dollars ($19.25).

Now, Therefore, The condition of this obligation is such, that if the above-named John B. Gleason shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
[SEAL.] By HUGH M. ALLWOOD,
Attorney-in-Fact.

Attest:
JAMES R. KINGSLEY, *Attorney.*

With this bond is an acknowledgment thereof and an affidavit of justification, and it is endorsed:

"Approved as to form and also as to sufficiency of sureties, with reservation, however, to the —— —— of the right at any time to examine the proper officers of the surety company under oath touching its assets, liabilities and financial condition generally.

"H. G. WARD,
U. S. Circuit Judge.

"(Filed November 27, 1911.)"

33 United States Circuit Court, Southern District of New York.

JOHN B. GLEASON, Plaintiff,
against
HARRY K. THAW, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States of the Second Judicial Circuit in and for the Southern District of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between John B. Gleason, plaintiff, and Harry K. Thaw, defendant, a manifest error hath happened to the great damage of the said plaintiff, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same at the Borough of Manhattan, City of New York, in the State of New York, on the 23d day of December, 1911, next, in the said United States Circuit Court of Appeals to be there and then held, that the record and proceedings aforesaid be- inspected, the said United States Circuit Court of Appeals may cause fur-
34 ther to be done therein to correct that error, what of right and according to law and custom of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 27th day of November, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America of the Second Judicial Circuit in and for the Southern District of New York.

The above writ of error is hereby allowed.

H. G. WARD,
U. S. Circuit Court Judge.

By the Honorable One of the Judges Holding the Circuit Court of the United States for the Southern District of New York in the Second Circuit to Harry K. Thaw and Charles Morehauser, His Attorney, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be

holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 23d day of December, 1911, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein John B. Gleason is plaintiff in error, and you
35 are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 27th day of November, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

W. G. WARD,
U. S. Circuit Court Judge in the Second Circuit.

United States Circuit Court, Southern District of New York.

I, John A. Shields, Clerk of the Circuit Court of the United States for the Southern District of New York do hereby certify that the foregoing is a true transcript of the summons, pleadings, order granting judgment, judgment, opinion, assignment of error and petition for writ of error, bond, approval thereof, writ of error and citation, made up pursuant to praecipe to be transmitted to the United States Court of Appeals for the Second Circuit on writ of error of the plaintiff in the suit wherein John B. Gleason is plaintiff and Harry K. Thaw is defendant.

In Witness Whereof, I have hereunto set my hand and seal of the Court this 8th day of December, 1911.

[L. S.] JOHN A. SHIELDS,
Clerk U. S. Circuit Court for the Southern District of New York.

36 United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 176.

JOHN B. GLEASON, Plaintiff-in-Error,
against
HARRY K. THAW, Defendant-in-Error.

Argued March 5, 1912. Decided April 8, 1912.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Coxe, Ward and Noyes, Circuit Judges.

On writ of error to the Circuit Court for the Southern District of New York to review a judgment overruling a demurrer to the first supplementary defense set up in the answer and dismissing the complaint with Costs.

John B. Gleason, Plaintiff-in-Error, in person.
Abram J. Rose and Alfred C. Pette, for Defendant-in-Error.

COXE, *J.:*

On June 28, 1906, the defendant, Harry K. Thaw, was indicted for murder committed in the City of New York. Briefly stated, the complaint alleges that in order to secure the services of the plaintiff as chief counsel, the defendant represented that he was the owner of an interest of at least $500,000 in the estate of his father and had an annual income of $30,000 in his own right. That relying upon these and other representations, the plaintiff consented to act as counsel for the defendant and performed services for him in that capacity which were worth the sum of $60,000 over and and above all payments. The complaint charges that all of
37 these representations were false and made with fraudulent intent. The defendant, among other defenses, pleaded in a supplementary answer, his discharge in bankruptcy by the District Court of Pennsylvania, dated December 29, 1910. To this the plaintiff demurs, insisting that the discharge is insufficient in law, the plaintiff's cause of action being liabilities for obtaining property by false representations. The demurrer was overruled and the plaintiff sues out a writ of error.

The identical question thus presented was involved in Gleason v. Thaw, 185 Fed. Rep., 345, decided February 24, 1911. The controversy was between the same parties and was decided adversely to Gleason. It may be that the Court might have decided the proposition before them upon some other ground, but there can be no doubt that the question now under consideration was before the Court and was decided by it. It is sufficient to state the language of the decision in the Pennsylvania case, as follows:

"The petition for review of this order in matter of law, under Section 24 (*b*) of the Bankruptcy Act, brings before us the single question, whether the debt sued for in the action brought by the petitioner against the bankrupt in the Circuit Court for the Southern District of New York was a liability for obtaining property by false pretenses or false representations, within the meaning of Section 17 (*a*) of the Bankruptcy Act as amended in 1903."

The Court considers this question at length and answers it in the negative, holding that the obtaining of legal services by false and fraudulent representations is not within the Bankruptcy Act for the reason that such services are not to be regarded as property.

38 This decision cannot be considered as res judicata, for the reason that it is not pleaded.

The issue upon a demurrer must be confined to the sufficiency of the pleading attacked. The answer fails to allege the prior adjudication. The defense that a discharge has been granted is not equivalent to a defense that a judgment has been rendered in a proceeding between the parties, holding that the effect of the discharge is to bar this action. It is not unlikely that an application to amend the answer by pleading the decision of the Pennsylvania court would have been granted. It is enough, however, that no such amendment was made.

We are inclined to the opinion that the doctrine of stare decisis may be invoked with propriety. The Court of Appeals of the Third Circuit has decided that obtaining the services of the plaintiff valued at $60,000 by false and fraudulent representations of the bankrupt as to the amount and value of his property and income is not obtaining property by false pretenses or false representations and that the claim of the plaintiff is barred by the discharge of the defendant in bankruptcy. If this question were presented as an original proposition, it is possible that we might take a different view. The construction for which the defendant contends discriminates against the lawyer, the physician, the teacher, and, indeed, every professional man whose capital is his brains, and the time, labor and money spent in fitting him to perform services of the highest value to those who employ him. It is, we think, at least doubtful whether Congress intended to discriminate against the professional man and in favor of the business man, because, in the latter case, the bankrupt has obtained goods and in the former he has obtained services by false and fraudulent representations. Did not Congress by the use of the comprehensive word "property" intend to

39 include both tangible and intangible property?

The question, as an original proposition, is not free from doubt. Much may be said in favor of the plaintiff's contention, but it has been decided adversely to him upon the same facts by a Court for whose judgments we have the highest respect, and we are not so clearly persuaded that their judgment is erroneous as to justify us in disregarding the rule of comity which is peculiarly applicable to the present situation. Mr. Justice Brown, in Mast, Foos & Co. v. Stover Co., 177 U. S., 495, has, at page 488, given the most clear and comprehensive exposition of the rule of comity with which we are

familiar. Referring to the duty of every Judge to decide the case before him upon the law and the facts, he says:

"In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

The foregoing quotation fairly describes our present attitude. We think there is sufficient doubt as to the accuracy of the plaintiff's contention to justify us in following the decision of the Third Circuit.

The judgment is affirmed.

40 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post-Office Building, in the City of New York, on the 18th day of April, one thousand nine hundred and twelve.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

JOHN B. GLEASON, Plaintiff-in-Error,
vs.
HARRY K. THAW, Defendant-in-Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it
41 hereby is affirmed, with costs.

A. C. C.

It is further ordered that a Mandate issue to the District Court in accordance with this decree.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit.—J. B. Gleason vs. H. K. Thaw.—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed Apr. 18, 1912.—William Parkin, Clerk.

42 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In obedience to the writ of certiorari annexed hereto,

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 41, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of John B. Gleason against Harry K. Thaw, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of September, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

[SEAL.] WM. PARKIN, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which John B. Gleason is plaintiff in error, and Harry K. Thaw is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
44 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3d day of May, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

45 [Endorsed:] File No. 23627. Supreme Court of the United States. No. 1052. October Term, 1912. John B. Gleason vs. Harry K. Thaw. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 10, 1913. William Parkin, Clerk.

46 [Endorsed:] File No. 23627. Supreme Court U. S. October term, 1914. Term No. 143. John B. Gleason, pl'ff in error, vs. Harry K. Thaw. Writ of certiorari and return. Filed September 17, 1913.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court

OF THE UNITED STATES OF AMERICA.

JOHN B. GLEASON, Petitioner
(Plaintiff and Plaintiff in Error below)

AGAINST

HARRY K. THAW, Respondent,
(Defendant and Defendant in Error below).

No. ~~1052~~ 5

Petition for a Writ of Certiorari.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of John B. Gleason for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit to review the case of John B. Gleason against Harry K. Thaw, respectfully shows from the transcript of record herewith presented and from this petition;

Your petitioner is a citizen of the State of New York and is an attorney and counselor of the courts of that State and of this Court. The defendant, Harry K. Thaw is a citizen of the State of Pennsylvania. In 1906, in order to obtain the services of the plaintiff upon credit and for his de-

fense as chief counsel upon an indictment for murder, he represented to your petitioner that he was the owner of an interest of at least $500,000 in the estate of his father and had a clear annual income of at least $30,000 without any restriction. Relying upon these and other material representations which are set forth in the complaint, your petitioner consented to act as counsel and performed services and made disbursements amounting to $60,000 over and above all payments. The representations were false and were made with fraudulent intent. In 1908 he filed his petition in bankruptcy in the District Court for the Western District of Pennsylvania. In 1909 your petitioner as plaintiff brought this suit in the Circuit Court of the United States for the Southern District of New York against Harry K. Thaw, as defendant, alleging in his complaint the facts showing the actual fraud of the defendant in obtaining the aforesaid services and disbursements. An order of the District Court in Bankruptcy was made for the stay of this action. The defendant was discharged in bankruptcy and the stay expired and the plaintiff proceeded with his suit. Thereupon the defendant by Morschauser & Hoysradt, his attorneys, interposed a supplemental answer and in his first defense pleaded the stay and the discharge, in bar of the plaintiff's cause of action. To this defence the plaintiff demurred and upon the trial of the demurrer it was decided by the Circuit Court that the discharge in bankruptcy was a bar to the plaintiff's cause of action and that inasmuch as no amendment would avail the plaintiff that judgment absolute should be given for the dismissal of the complaint. Judgment was entered against the plaintiff and the plaintiff proceeded by writ of error to review the judgment. Upon April 18, 1912, the Circuit Court of Appeals affirmed the judgment of the Circuit Court and your petitioner seeks that the proceedings in this suit may be reviewed in this court.

Specification of Errors.

1. The Circuit Court of Appeals erred in affirming the judgment against the plaintiff, your petitioner, and should have reversed the judgment upon the ground that a liability of the defendant to the plaintiff was shown upon facts showing actual fraud on the part of the defendant in obtaining the services and disbursements stated in the complaint by false representations; which is a liability for obtaining property by false pretenses or false representations within the meaning of the following statute:

Bankruptcy Act, S. 17, "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations."

2. The Court should have decided that the stay of this action in bankruptcy is in no event a bar to the prosecution of this action after the expiration of the stay.

1. The sole ground of the affirmance is that services are not property within the meaning of this statute. It appears from the opinion that the Court would have decided in favor of the plaintiff except for the comity which led it to follow the opinion in Gleason *v.* Thaw, 107 C. C. A., 463, "until a higher court has settled the law," and that justice is denied to your petitioner upon the ground of comity between courts. Therefore it seems that this case should be reviewed. Further, there are many cases of frauds upon laborers and men in professions or business to which it seems that this decision will be applied as a rule of decision until the same is overruled in this court upon a writ of *certiorari*. And because the ordinary condition of the persons affected by this decision is such that long litigation on their part is impracticable, this decision, unless now reviewed, may remain the law even though in

conflict with the definition of property made by this Court.

The contention of your petitioner is;

The word *property* is not a term of art and its meaning is fairly stated in the celebrated passage of Locke in his ESSAY book 4, chapter 3. "Where there is no property there is no injustice is a proposition as certain as any demonstration in Euclid; for the idea of property being a right to anything, and the idea to which the name of injustice is given being the invasion or violation of that right, it is evident that, these ideas being thus established and these names annexed to them, I can as certainly know this proposition to be true as that a triangle has three angles equal to two right ones." The numerous decisions to some of which the attention of the public has recently been directed and which hold that labor is property are based upon this common acceptation of the word, as in Ritchie *v.* People, 155 Ill., 98, saying "Labor is property and the laborer has the same right to sell his labor and to contract with reference thereto as has any other property holder." (Cf. Matter of Jacobs, 33 Hun, 374, affirmed 98 N. Y., 99, and the definition of Mr. Justice Swayne in Slaughter House Cases, 83 U. S., 36.) It seems a misconstruction of these decisions to hold that my services are property in order that I may work for Thaw, but are not property when I seek my pay.

The Circuit Court of Appeals in the Third Circuit relied upon the authority of the statute 30 George 2 which does not contain the word *property* and which with reference to things that may be pawned defines Extortion and the obtaining such goods by false pretenses. But it has repeatedly been decided that labor and business is property within the meaning of the criminal law where the word property is used, as in People *v.* Barondes, 61 Hun, 581, affirmed 133 N. Y., 649; People

v. Hughes, 137 N. Y., 29. The ground of the decision is stated in the former case to be "Business is property as much as the articles themselves which are included in its transactions. And this is comformable to the significance given to the same term by legal writers; for it has been said by Blackstone that property consists in the free use, enjoyment and disposal of all the owner's acquisitions, without any control or diminution, save only by the law of the land." In the Bankruptcy Act of 1898, the exemption of Section 17 (2) was "Judgments in actions for frauds," and it seems an unfortunate construction of the mischief intended to be remedied by the amendment of 1903, that the amendment should by judicial construction be made to state that frauds upon labor are discharged, but that frauds upon capital are not discharged. It seems that the intent of this amendment was to restore the law of 1867 by relieving the creditor from the necessity of having obtained a judgment in an action based upon the defendant's fraudulent misconduct. (*In re* Gilpin, 160 Fed., 171, 178.) This follows if the Congress is taken to have intended the word *property* to be taken as defined in the prior decisions of this court under this statute. Thus in Pirie *vs.* Chicago Title & Trust Co., 182 U. S., 438, property within the Bankruptcy Act is defined as "Anything of value—anything of debt paying or debt securing power." In Page *v.* Edmunds, 187 U. S., 596, it was held to include things intangible, as the right or privilege to a seat upon an exchange. But the Circuit Court Court of Appeals in the Third Circuit speaks of "a substantive thing—a *res*," as if by these terms rights are excluded; and says: "In some judgments as well as in some *obiter dicta*, the word property has been made to cover, by a sort of rhetorical flourish, everything tangible and intangible of

which value may be predicated." (Gleason *v.* Thaw, 107 C. C. A., 463.)

2. The scope of a stay in bankruptcy has appeared to your petitioner to be involved in this case, particularly upon the concession of your petitioner at all times made that the opinion of the Circuit Court of Appeals in the Third Circuit states as the sole ground of the stay that the plaintiff's services are not property. In the view of your petitioner such a stay falls with the principle laid down in Denney *v.* Bennett, 128 U. S., 499 (not in bankruptcy), as being "the decision of a motion or summary application which is not to be regarded in the light of *res adjudicata*." (Simpson *v.* Hart, 14 Johnson, 63, 76; Easton *v.* Pickersgill, 75 N. Y., 599; Bigelow on Estoppel, pp. 51,-55, 5th ed.) And because the order granting the stay is pleaded and is set forth at page 20 of the transcript, it seems to fall within the rule in Russell *v.* Place, 94 U. S., 606. "If upon the face of a record, there is anything left to conjecture, as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." In Bankruptcy under former statutes, it was decided that the entire effect of a stay is temporary and that when the discharge is granted the stay is altogether *functus*, leaving the question of law to be decided by the court in which the discharge is pleaded (*in re* Rosenberg, 12,654 Fed. Cases, p. 1194; *in re* Thomas, 13,890 Fed. Cases, p. 932, cf. Loveland on Bankruptcy 7th ed. p. 113). Therefore it seems that the court below erred in so far as it decided that the effect of a stay as *res adjudicata* depends upon the manner in which it is pleaded and that this question is of such importance that the court should review it.

Because there appears to be a conflict of opinion between the decisions of the courts upon the fore-

going, and because of the actual and substantial injury to your petitioner and of others in like manner situated by reason of this conflict of opinion, your petitioner prays that this Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Court for such proceedings therein as shall be just.

JOHN B. GLEASON,
Petitioner.

Southern District of New York, ss.:

JOHN B. GLEASON, being duly sworn, says that he is the petitioner named in the foregoing petition and that the facts stated in the foregoing petition are true of his own knowledge except as to those matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, and that he prays for a reversal of the aforesaid judgment. Deponent further says that he is an attorney and counselor of this court and that in his opinion the petition is well founded.

JOHN B. GLEASON.

Sworn to before me this 26th day of March, 1913.

CHARLES L. THATCHER,
Notary Public,
[L. S.] New York County.

JOHN B. GLEASON,
Attorney and Counsel in person,
2 Rector Street, New York City.

MOTION.

Comes now April 14, 1913, the petitioner John B. Gleason in his own behalf being a counselor of this court and upon a certified copy of the entire record of the Circuit Court of Appeals for the Second Circuit in the suit of John B. Gleason, original plaintiff and plaintiff in error against Harry K. Thaw original defendant and defendant in error and upon his petition verified March 26th, 1913, moves this Court that it shall by writ of *certiorari* directed to the Judges of the Circuit Court of Appeals for the Second Circuit require the said Court to certify to this Court for its review and determination, a certain cause in said Circuit Court of Appeals for the Second Circuit lately pending wherein John B. Gleason was plaintiff in error and Harry K. Thaw was defendant in error.

NOTICE OF MOTION.

To MORSCHAUSER & HOYSRADT,
Attorneys for Harry K. Thaw.

Please take notice that upon a certified copy of the entire record of the cause in the Circuit Court of Appeals for the Second Circuit wherein John B. Gleason was plaintiff in error and Harry K. Thaw was defendant in error appearing by you as his attorneys and upon the petition of John B. Gleason verified March 26th, 1913, a copy of which record and petition and accompanying motion is herewith served upon you, a motion will be made in the said action before the Supreme Court of the United States of America at its court room in the Capitol at Washington, D. C., Monday, upon the 14th day of April, 1913, at the opening of the court on that day, that it shall be by writ of *certiorari* directed

to the Judges of the Circuit Court of Appeals for the Second Circuit require the said Court to certify to the Supreme Court of the United States of America, for its review and determination, a certain cause in said Circuit Court of Appeals for the Second Circuit lately pending, wherein John B. Gleason was plaintiff in error and Harry K. Thaw was defendant in error.

Dated April 26, 1913.

JOHN B. GLEASON,
Attorney and Counsel for the petitioner,
2 Rector Street,
New York City.

Supreme Court of the United States.

OCTOBER TERM, 1914.

JOHN B. GLEASON,
Petitioner,
AGAINST
HARRY K. THAW.

No. 143

BRIEF FOR PETITIONER.

Certiorari to the Circuit Court of Appeals for the Second Circuit, to review the action of John B. Gleason, plaintiff, against Harry K. Thaw, defendant, brought in the Circuit Court for the Southern District of New York, wherein judgment was rendered against the plaintiff, overruling a demurrer to the first supplementary defense set up in the answer and dismissing the complaint, with costs; from which judgment a writ of error was had to the Circuit Court of Appeals of the Second Circuit, which has affirmed the judgment of the Circuit Court; whereupon on petition of the plaintiff a writ of *certiorari* was granted by this Court.

Statement.

The statement of facts given in the opinion of Judge Coxe, in the Circuit Court of Appeals says,

fol. 36: "On June 28, 1906, the defendant, Harry K. Thaw, was indicted for murder committed in the City of New York. Briefly stated, the complaint alleges that in order to secure the services of the plaintiff as chief counsel, the defendant represented that he was the owner of an interest of at least $500,000 in the estate of his father, and had an annual income of $30,000 a year in his own right. That relying upon these and other representations, the plaintiff consented to act as counsel for the defendant and performed services for him in that capacity which were worth the sum of $60,000 over and above all payments. The complaint charges that all these representations were false and were made with fraudulent intent. The defendant among other defences pleaded in a supplementary answer his discharge in bankruptcy by the District Court in Pennsylvania, dated December 29, 1910. To this the plaintiff demurs, insisting that the discharge is insufficient in law, the plaintiff's cause of action being for obtaining property by false representations." The complaint also alleges the disbursement of $10,115 in money, and that but for the false representations the plaintiff would not have performed these services nor have made these disbursements (fol. 7). The defence also pleads a stay of the plaintiff's action granted by the Court in Bankruptcy which stay is set forth and the "said bankruptcy proceedings and the said discharge" are pleaded in bar (fols. 17-18).

Specification of Errors. I. The Court below erred in affirming the judgment of the Circuit Court against the plaintiff (fol. 31), and should have reversed the judgment upon the ground that a liability of the defendant to the plaintiff for ob-

taining property by false representations was shown by the complaint upon facts showing actual fraud on the part of the defendant and within the meaning of Section 17.2 of the Bankruptcy Act, which section is as follows:

Bankruptcy Act, Section 17.

"17. *Debts not affected by a discharge—a.* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity."

2. The Court further erred in not holding that the stay in bankruptcy is not a bar to this action and should have overruled this part of the defence, nor should it have expressed any opinion or made any decision to the effect that the effect of such a stay is a bar to this action.

POINT I.

The complaint alleges actual fraud.

This is apparent upon a reading of the complaint. The credit was begun upon the positive statements of the defendant as to the amount of his property with the right to the plaintiff to withdraw the credit if the defendant did not procure an agreement from his mother to pay the bulk of the other expenses as advancements repayable only from his share in her estate. The extension of the credit was obtained by the subsequent statements of the defendant as detailed in the complaint and in reliance upon all the statements.

POINT II.

The right to command services is property, and the services also are property within the meaning of the Bankruptcy Act.

The word *property* is not a term of art and its meaning is fairly stated in the celebrated passage of Locke in his Essay, Book 4, Chapter 3. " 'Where there is no property there is no injustice,' is a proposition as certain as any demonstration in Euclid; for the idea of property being a right to anything, and the idea to which the name of injustice is given being the invasion or violation of that right, it is evident that these ideas being thus established and these names annexed to them, I can as certainly

know this proposition to be true as that a triangle has three angles equal to two right ones." The numerous decisions which hold that labor is property are based upon this common acceptation of the word, as in Ritchie *v.* People, 155 Ill., 98, saying, "Labor is property and the laborer has the same right to sell his labor and to contract with reference thereto as has any other property holder." (cf. Matter of Jacobs, 33 Hun, 374: affirmed 98 N. Y., 99, and the definition of Mr. Justice Swayne in the Slaughter House cases, 83 U. S., 36: "Property is everything which has an exchangeable value and the right of property includes the power to dispose of it according to the will of the owner. Labor is property and as such merits protection. The right to make it available is next in importance to the rights of life and liberty."

These words have been repeatedly cited in both the State and the Federal courts in deciding that labor is property. That *property* is *nomen generalissimum* for every valuable right or interest has been decided in times innumerable (cf. Caro *v.* El. R. R., 46 N. Y. Superior, 140-7, for seven pages of citations, and cf. Anderson's Dictionary, Title, Property).

The definition of the Roman law is "Dominium is jus utendi." Following this, it is often said that property is not any tangible thing, but is the right of user (Lewis, Em. Domain, S. 54; Dixon *v.* People, 168 Ill., 179; Wynehamer *v.* People, 13 N. Y., 433; Jackson *v.* House, 17 Johnson, 283; Sherman v. Elder, 24 N. Y., 384, etc.). But in the respondent's brief in the Court below it was contended in capital letters that property within the meaning of the bankruptcy act is *property of a tangible nature and of which the owner could be physically de-*

pessimism of Schopenhauer's "There is exactly enough of justice in the world to make people believe there is such a thing as justice," acquires a new illustration. But this Court has said that value is the test of property, not tangibility, nor whether the property is destroyed in the using. It has never sanctioned any such distinction as that if the management of the Metropolitan Opera House should go into bankruptcy to-morrow, after having obtained services and pianos by fraud, the fraud upon Caruso is discharged while the instrument seller or money lender is protected. Under the rule in Pirie *v.* Trust Co., *supra*, the test is, Did Thaw obtain anything of value? First he acquired a right to command the plaintiff's services, which is a right of value whether it is a right of perfect or imperfect obligation, according as its sanction is defined as resting in command or in the *Mores*. Its sanction rests in command, because the law authorizes contracts for legal services, but the promise is also sanctioned by the Mores and needs no command of the law to make it valuable. Also he obtained forbearance and "the forbearance or giving time for the payment of a debt is in the nature of a loan," Dirks *v.* Kennedy, 16 N. J. Eq., 210. Also he obtained services conceded to be of great value.

The opinion of the C. C A., Third Circuit, Gleason *v.* Thaw, 107 C. C. A., 463, challenges criticism by its reference to the foregoing decisions as "rhetorical flourish," saying, "In some judgments as well as in some *obiter dicta*, the word property has been made to cover, by a sort of rhetorical flourish, everything tangible or intangible of which value may be predicated." Further the Court says in effect that my services are property in order that I may work for Thaw, but

cease to be such when I seek my pay. It seems to think that to except the fraud from the bankruptcy act would be "to enlarge or change the ordinary remedies," but the exception leaves me to the remedies that the law has always given. Next the Court insists that there should be a physical transfer in order that there shall be property. The right of user was transferred to the defendant as well as the actual user, and these things of value were obtained. If this opinion is examined for a definition of *property* two definitions are offered "*nomen generalissimum* restricted by the maxim *noscitur a sociis, etc.*," and it is a *res*. The Court omits to notice that the *socii* here are the uses of this word in this act to include every intangible right of value. If it is not *nomen generalissimum* for this, with deference it may be asked, what does the Court mean by saying that it is n. . g. . ? My definition is rejected as rhetorical flourish leaving me without a definition, so that I may take for myself and not for that court the words of Locke, "He that hath words of any language without distinct ideas in his mind to which he applies them, does, so far as he uses them in discourse, only make a noise without any sense or signification." In saying that property is *res* I must take it that the term *res* is not used according to its legal sense, "*quæ jure consistunt*," rights and the subjects of rights, right of user and user (Gaius, Lib. II, *de rebus singulis*, Ss. 12, 13, 14; c.f. Poste's Gaius, pp. 147-150, where the learned editor is of opinion that such a right as the dominion obtained by Thaw is *res corporalis*).

The brief of the defendant in the Court below claimed that "The right of obtaining money or goods by false pretenses is of great antiquity." In 19 Encyclopædia, page 387, it is correctly stated that be-

fore the Statute of 30 George II, the only false pretense punishable criminally was a false token. The word property nowhere occurs in this Statute and its operation is restricted to goods which may be pawned. It names two crimes, extortion and false pretenses in obtaining pawnable goods. It is submitted that as the construction for which the plaintiff contends is in aid of the equality of the law, the meaning of the term property should not be cut down by the instance of a statute in which the term is not used. It were better to consider a criminal statute about extortion or false pretenses in which the term *property* is used, as for example, Section 553 of the Penal Code of the State of New York, which says: "Fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the person or property of the person threatened." Commenting upon this statute Judge Daniels said (People *v.* Barondess, 61 Hun, 581; affirmed on this opinion 133 N. Y., 649; also affirmed People *v.* Hughes, 137 N. Y., 29): "The statute does not require the narrow construction insisted upon by the defendant's counsel. For it has not been, either by its language or reasonable import, confined to the case of an actual injury to some specific article of property, but it has been made to the threat to do any unlawful injury to property. And business is property, as much so as the articles themselves which are included in its transactions. And this is conformable to the significance given to the same term by legal writers; for it has been said by Blackstone that property consists in the free use, enjoyment and disposal of all the owner's acquisitions, without any control or diminution, save only by the law of the land."

Therefore in opposition to the view of Judge

Gray in the above opinion it appears that an injury to intangible property may be punished criminally "in a proper and strict interpretation" of the criminal law. But the present statute is a remedial one —"made for honest men."

POINT III.

The $10,115 of disbursements are property.

It is well pleaded at folio 7 that the plaintiff would not have made these disbursements except for the fraud.

POINT IV.

The stay is well pleaded, but is not a bar.

The defence demurred to pleads that upon proceedings duly had and on notice to the plaintiff an order, of which a copy is annexed, was duly made, staying the plaintiff, &c., folio 17, and that by virtue of said proceedings, and the said discharge the plaintiff is barred. Upon a demurrer it is no valid criticism that these facts might have been stated as two separate defences. Therefore the question of the scope of this stay is before this Court. The stay cannot be a bar, because its operation is limited in time. It has been repeatedly decided that

the effect of such a stay is temporary, and that when the discharge is granted the stay is *functus,* leaving the question of law to be decided by the Court in which the action is pleaded: (*In re* Rosenberg, 12654 Fed. Cases, p. 1194; *in re* Thomas, 13,890 Fed. Cases, p. 932: cf. Loveland, Bankruptcy, 7th ed., p. 113.) It falls within the principle laid down in Denney *v.* Bennett, 128 U. S., 499 (not in bankruptcy), as being "the decision of a motion or summary application, which is not to be regarded in the light of *res adjudicata.*" If now we look at the order itself at folio 20, it falls within the rule in Russell *v.* Place, 94 U. S., 606, "If upon the face of a record there is anything left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." And it is respectfully submitted that this Court should not in overruling this defence accord to the defendant leave to amend. The petitioner concedes in open court as part of the record and of the defence demurred to, that the opinion of the Court which granted the stay states as the sole ground of the opinion that the plaintiff's cause of action is not upon a liability for obtaining property by false pretenses or false representations and also that this is stated as the opinion of the C. C. A. affirming this order. It was within the discretion of the Court to grant this stay, and the stay must be construed according to its legal and temporary effect. Certainly it never has been the opinion of the profession, nor can it be the law that an order of this temporary nature shall be given the effect of a final adjudication if an opinion of the Court granting the order can be procured.

The judgment of the Circuit Court of Appeals

for the Second Circuit (fol. 40) should be reversed and the judgment of the Circuit Court herein (fol. 28) should be reversed, with costs, and that the action shall stand for trial upon the other issues raised by the pleadings.

JOHN B. GLEASON,
Petitioner and appearing as counsel
in his own behalf.